





**2110439 (Migration) [2023] AATA 1331 (13 February 2023)**

**DECISION RECORD**

**DIVISION:** Migration & Refugee Division

**REPRESENTATIVE:** Ms Carina Ford

**CASE NUMBER:** 2110439

**MEMBER:** Margie Bourke

**DATE:** 13 February 2023

**PLACE OF DECISION:** Melbourne

**DECISION:** The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl 820.211(2) and cl.820.221 of Schedule 2 to the Regulations.

Statement made on 13 February 2023 at 2:56pm

**CATCHWORDS**

*MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – Federal Circuit Court remittal – genuine spousal relationship – financial aspects – nature of the household – social aspects – nature of the commitment – decision under review remitted 1.*

**LEGISLATION**

*Migration Act 1958 (Cth), ss 5F, 65*

*Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 820.221, 820.321*

**CASES**

*He v MIBP [2017] FCAFC 206*

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (Cth) (the Act).
3. The applicant applied for the visa on 26 November 2013 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The Department refused the application for the visa in a decision record dated 23 May 2014 on the basis that the applicant did not meet the Schedule 3 criteria for the purposes of cl.820.211(2)(d), and there were no compelling reasons for waiving these requirements. The Tribunal, differently constituted, in a decision dated 8 July 2015, remitted the matter back to the Department with the direction that the applicant met the requirements of cl.820.211(2)(d).
5. The delegate refused the application for the visa in a decision record dated 18 October 2016 on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied the applicant had provided sufficient evidence and information to demonstrate that he was the spouse of the sponsor within the meaning of s.5F(2) of the Act. The Tribunal, differently constituted, in a decision dated 17 July 2017, affirmed the decision of the Department.
6. By consent order of the Federal Circuit Court of Australia dated 6 August 2021 the matter was remitted back to the Tribunal on the basis that the decision of the Tribunal dated 17 July 2017 is affected by jurisdictional error on the basis the Tribunal made findings with no evidentiary basis, and these findings were material to the Tribunal's ultimate conclusion that the applicant and sponsor were not in a genuine and continuing spousal relationship.
7. The applicant appeared before the Tribunal on 13 February 2023 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor, [Ms A], who attended the hearing. The Tribunal received oral evidence from three witnesses who attended the hearing by telephone, including [Ms B] school principal, [Ms C] carer and [Mr D], friend.
8. The applicant was represented in relation to the review.
9. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.
- 10.

## CONSIDERATION OF CLAIMS AND EVIDENCE

### Whether the parties are in a spouse or de facto relationship

11. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
12. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

### 13. Nondisclosure certificate

14. There was a nondisclosure certificate dated 16 December 2016 issued on the Department file. A copy of the certificate was provided to the applicant prior to the hearing. The applicant's representative advised the Tribunal that the documents listed in the certificate had been provided to the applicant by the Department. Subsequently this certificate was revoked by the Department. The applicant was advised accordingly.

### 15. Invitation for additional witnesses to attend

16. The Tribunal invited the applicant to arrange for additional witnesses to attend the hearing by telephone, including the school principal at [School 1], the carer at the residential home where the sponsor's eldest son now resides, the friend who arranged the employment for the sponsor's youngest son, and the sponsor's youngest daughter's treating medical professional. The applicant arranged for the first three witnesses to attend the hearing, but an appointment was unable to be arranged with the treating medical professional prior to the hearing to discuss their attendance as a witness.
17. In addition to the submissions and evidence provided by the applicant, the Tribunal places weight on the evidence provided by these witnesses. The Tribunal accepts the evidence of the principle of [School 1] who states she had worked at the school for 20 years, was present at the school when the sponsor's oldest child first attended approximately [number] years ago, has met both the applicant and sponsor, was aware that the applicant and sponsor were married, and that they acted as the parents of the three children who attended the school. The witness stated that the sponsor would reference the applicant in conversation and the witness' observations were that the applicant was very caring towards the children. This witness stated she had no doubts that the applicant and sponsor were in a genuine spousal relationship.
18. The Tribunal accepts the evidence of [Ms C], a carer of the sponsor's eldest child. She stated the eldest child had been under her direct care since [date] when he came into her residence, but she had met him before that date. This witness stated she was aware the applicant and sponsor were husband and wife and based on her observations of how they

behaved towards each other and to the children, she concluded their relationship is genuine. This witness stated she had built a relationship with the applicant and sponsor from a work perspective as the parents of the sponsor's eldest child. She stated she interacted with the applicant and sponsor every week, and was aware they spoke to the sponsor's eldest child every day and visited him weekly. This witness stated the sponsor's eldest child is very family orientated and is very settled in his current residence.

19. The Tribunal accepts the evidence of [Mr D], a friend of the applicant who has known him for four years and was introduced to him by his cousin. The Tribunal accepts the evidence of this witness, that he is aware of the relationship between the applicant and sponsor, and his family circumstances. The Tribunal accepts this witness helped arrange employment for the sponsor's second son, by recommending him to his supervisor at the [workplace], and more recently to his manager at a [different workplace]. This witness stated the relationship between the applicant and sponsor is genuine and true and they have lived together for many years.

#### **20. Assessment of the evidence**

21. The applicant and sponsor gave consistent evidence in relation to the schools the children attended, their financial arrangements, the houses they have lived in, their movements, the commitments to each other, the improvements and achievements of the sponsor's children, their plans for future and the difficulties they have faced.
22. The Tribunal considers the applicant and sponsor may have had short periods of separation, when the applicant remained in [City 1] and the sponsor visited her family in [City 2], or at times when the commitment to looking after three children with complex and demanding needs may have taken its toll. However, the Tribunal is satisfied that overall the applicant and sponsor have remained together supporting each other through very difficult family circumstances and difficult financial circumstances. The Tribunal is satisfied that the applicant and sponsor have been, and remain committed, to supporting each other and their three children as a family.
23. The Tribunal has considered the information on the Centrelink records, including the Centrelink statements provided by the applicant to that Tribunal, which records the sponsor was not partnered. The Tribunal accepts that because the applicant was not granted work rights and therefore had no income, the sponsor was assessed and received a benefit as a single parent. The Tribunal accepts the evidence of the applicant and sponsor, that the sponsor had only reported to Centrelink that she was separate from the applicant when she went to [City 2] on her own in 2014. The Tribunal accepts the evidence of the applicant and sponsor that they have not lived apart for any significant period of time, and that the sponsor had not reported to Centrelink that she was single and separated from the applicant for any significant period of time.

#### **Are the parties validly married?**

24. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. Based on the registered marriage certificate, I am satisfied that the applicant and sponsor were married in [City 1] on [date] September 2013. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

#### **Are the other requirements for a spouse relationship met?**

25. *Financial aspects of the relationship:* – the Tribunal is satisfied that the applicant and sponsor do not have any joint ownership of real estate or other major assets, and do not

have any major joint liabilities together. The Tribunal is satisfied that the parties pool their financial resources in the sense that they have a joint bank account. The Tribunal accepts that the only source of income for the applicant and sponsor has been, and is, the sponsor's Centrelink benefit, which is paid into her personal account and she transfers money into the joint account. The Tribunal is satisfied that since 2019 the parties have resided at the sponsor's mother's home and have not had to pay rent. The Tribunal is satisfied that since 2021 the sponsor's second son has had casual employment and contributed between \$100 and \$200 to the family expenses per week. The Tribunal is satisfied that neither person in the relationship owes any legal obligation in respect of the other. The Tribunal is satisfied that the parties share the day-to-day household expenses from the source of the Centrelink benefit, and the bills and household needs are paid out of either the joint account or the sponsor's personal account.

26. The evidence of the financial aspects of the relationship indicate that the parties are in a genuine and continuing relationship at both the time of application and the time of decision.
27. *Nature of the household:* – the Tribunal is satisfied based on the oral and written evidence before it that the applicant and sponsor share the joint responsibility for the care and support of the sponsor's three children. The Tribunal is satisfied that the applicant and sponsor lived together as a married couple at the shared rental properties, that they resided at [Address 1] from the end of 2015 until the end of 2019, and have subsequently resided at the sponsor's mother's property until the present time. The Tribunal is satisfied that the applicant sponsor share the responsibility for the housework.
28. The evidence of the nature of the household indicates that the parties have a mutual commitment to a shared life as a married couple to the exclusion of all others, and lived together and not separately and apart, on a permanent basis, both at the time of application and at the time of decision.
29. *Social aspects of the relationship:* – based on the oral and written evidence before the Tribunal including the parents of the applicant (noting his mother passed away in 2019) and the mother of the sponsor, community members, treating medical, educational and caring professionals, and friends, the Tribunal is satisfied that the parties represent themselves to other people as being married to each other. The Tribunal has considered the written and oral evidence before it and is satisfied that in the opinion of their friends and acquaintances, their relationship is genuine, true, caring, supportive and continuing. The Tribunal is satisfied that the applicant and sponsor plan and undertake their joint social activities based on the needs of their family, particularly including the three children have special physical, emotional and social needs and in particular the requirement that the sponsor's daughter is to be monitored at all times.
30. The evidence of the social aspects of the relationship indicates that the parties are in a genuine and continuing relationship, both at the time of application and at the time of decision.
31. *Nature of the persons' commitment to each other:* – the Tribunal is satisfied that the applicant and sponsor have been married since [date] September 2013, and have resided together except for short periods apart since February 2013. At the time of application for the visa in November 2013 the parties had lived together for approximately nine months, and been married for two months. At the time a decision the Tribunal is satisfied that the parties have lived together for 10 years, and been married for 9 ½ years. The Tribunal is satisfied that the applicant and sponsor provide companionship and emotional support to each other, through the long visa application process, the death of the applicant's mother, and the health crisis faced by the sponsor's children and the sponsor, and the educational and employment challenges faced by the sponsor's children and the ongoing financial difficulties of the family.

The Tribunal is satisfied that the applicant and sponsor see their relationship is long-term and plan in the future if the applicant is granted the visa, for the applicant to obtain work, to try to toilet train the sponsor's now teenage daughter, to save to buy their own house, and to arrange for the applicant's father to visit them.

32. The evidence of the nature of the persons' commitment to each other indicates that the parties are in a genuine and continuing relationship and have a mutual commitment to a shared life as a married couple to the exclusion of all others, at the time of application and at the time of decision.
33. *Conclusions:* – the Tribunal has considered the circumstances of their relationship as set out in r.1.15A(3), and is satisfied that at the time of application and at the time of decision the applicant and sponsor had a mutual commitment to a shared life as a married couple to the exclusion of all others, were in a genuine and continuing relationship, and lived together, and not separately and apart, on a permanent basis.
34. The Tribunal therefore finds that at the time the application for the visa was made and at the time of decision, the applicant and sponsor were in a spousal relationship within the meaning of s.5F(2).
35. Therefore, the applicant meets cl.820.211(2)(a).
36. The Tribunal has considered the sponsorship forms and the identity documents in relation to the sponsor. The Tribunal is satisfied the applicant is sponsored by the applicant's spouse who had turned 18, and therefore the applicant meets the requirements of cl.820.211(2)(c).
37. As stated above, the previous decision of the Tribunal dated 8 July 2015 found that the applicant met the requirements of cl.820.211(2)(d).
38. Therefore, the Tribunal is satisfied that at the time of application, the applicant meets the requirements of cl.820.211(2).
39. At the time of decision, the Tribunal is satisfied that the applicant continues to meet the requirements of cl.820.211(2), and therefore the applicant meets the requirements of cl.820.221.
40. For the above reasons the Tribunal finds the applicant satisfies the criteria in cl.820.211(2) and cl.820.221.
41. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

## **DECISION**

42. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
  - cl 820.211(2) and cl.820.221 of Schedule 2 to the Regulations.

Margie Bourke  
Member



## **ATTACHMENT - Extract from Migration Regulations 1994**

### **1.15A Spouse**

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
  - (a) a Partner (Migrant) (Class BC) visa; or
  - (b) a Partner (Provisional) (Class UF) visa; or
  - (c) a Partner (Residence) (Class BS) visa; or
  - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
  - (a) the financial aspects of the relationship, including:
    - (i) any joint ownership of real estate or other major assets; and
    - (ii) any joint liabilities; and
    - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
    - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
    - (v) the basis of any sharing of day to day household expenses; and
  - (b) the nature of the household, including:
    - (i) any joint responsibility for the care and support of children; and
    - (ii) the living arrangements of the persons; and
    - (iii) any sharing of the responsibility for housework; and
  - (c) the social aspects of the relationship, including:
    - (i) whether the persons represent themselves to other people as being married to each other; and
    - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
    - (iii) any basis on which the persons plan and undertake joint social activities; and
  - (d) the nature of the persons' commitment to each other, including:
    - (i) the duration of the relationship; and
    - (ii) the length of time during which the persons have lived together; and
    - (iii) the degree of companionship and emotional support that the persons draw from each other; and
    - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).